TAN CHIN MENG

v.

PP

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
T SELVENTHIRANATHAN JCA
ABDUL WAHAB PATAIL JCA
[CRIMINAL APPEAL NO: K-05-88-2005]
31 JANUARY 2011

CRIMINAL PROCEDURE: *Penal Code - Section 302 - Murder - Appeal against conviction and death sentence - Proof of mens rea - Discrepancy as to time and cause of death - Accuracy of cautioned statement and recording - Defences of gross negligence manslaughter, grave and sudden provocation - Unchallenged testimony of witnesses - Whether proper consideration of evidence by trial judge*

The appellant was convicted and sentenced to death by the learned judge of the High Court for the murder of his wife ('the victim') pursuant to s. 302 of the Penal Code. The appellant and the victim had lived with their five children at the material time. The appellant's older three children had given evidence as prosecution witnesses. They had discovered the victim motionless on the bed with a raffia string and a belt tied around her neck. The appellant was lying unconscious on the floor with a bottle of alcohol next to him. A post mortem examination of the victim revealed that she had died of "ligature strangulation with multiple stab wounds". The appellant now appealed to this court against his conviction and death sentence.

The issues raised, *inter alia*, were: (1) whether the prosecution failed to prove the *mens rea* for the offence; (2) whether the discrepancy as to the time of death was not taken into consideration; (3) whether the accuracy of the cautioned statement under s. 115 of the Criminal Procedure Code ('CPC') was questionable since the investigating officer conversed with the appellant in Teochew whilst the interpreter had conversed to him in Hokkien; and (4) whether the appellant was induced to make the cautioned statement on the ground that he was offered food and drink prior to the taking of the cautioned statement.

Held (dismissing the appeal):
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) To cast a reasonable doubt on the prosecution case, it was not enough to show by logic and reason that there was only a possible doubt, for that was theoretical or hypothetical. The argument must condescend and point to the particular facts and circumstances that made the possible doubt at least probable as in the instant case. The decision of Denning J (as he then was) in *Miller v. Minister of Pensions* provided a useful guidance to counsel as to how best to present their submissions. (paras 20 & 21)

(2) The discrepancy as to the time of death was not raised at the trial and was therefore a non-issue. It was not put to the children whether the victim was still alive when they found her or to the medical assistant (SP2) who had received the victim's body at the hospital. Regardless of the actual time of death, time was not material to the defence. The same reasoning applied as to the cause of death. The fact that there was no blood on the raffia string was hardly material since it was not suggested that the raffia string had caused a bleeding cut in the neck. (paras 25-27)

(3) The post-mortem report showed that the victim would have died of the ligature strangulation if that was the only mode used. It was not put to the pathologist that the injuries on the victim's neck indicated by the ligature marks were limited and could not have caused strangulation. Also, whilst there was no blood found on the screwdriver, it was not put to the relevant witness that the tests he conducted would confirm traces of blood on the screwdriver if it had been used to stab the victim. It was also not put to the pathologist who had concluded that the cause of death was "ligature strangulation with multiple stab wounds" that the stab wounds could not have caused death. (paras 27 & 28)

(4) *Mens rea* is not capable of proof by direct evidence but inferred from other facts. The post mortem report and the oral testimony of the pathologist left no doubt as to the cause of death, *ie*, by injuries caused by strangulation and by the seven stab wounds that could not have been caused accidentally. (paras 30 & 31)

(5) There was no basis for the defence of manslaughter by gross negligence on the ground that the raffia string was tied so tightly and the fact that the victim was stabbed seven times. (para 33)

(6) The accuracy of the cautioned statement under s. 115 CPC was not raised in cross-examination. Also, the accuracy of the recording of the statement was not put to the magistrate in the trial within the trial. It was clearly an afterthought and contained no merit. (paras 40 & 43)

(7) The test of grave and sudden provocation was objective and not subjective. The appellant's submission clearly applied the subjective test and therefore failed. (para 46)

(8) There was nothing on record to show that the appellant was dissatisfied with and rejected the truth or accuracy of the testimony of the witnesses, whether in the examination-in-chief or in the cross-examination. The questions in cross-examination sought to obtain information and not challenge the truth or accuracy of the witness' testimonies. Therefore there was no necessity to consider rejecting the testimony or any part thereof of any witnesses. (para 59)

(9) The learned judge had directed himself correctly when he reminded himself of *Chan Kim Siong v. PP* with regard to circumstantial evidence and *Sainal Abidin Mading v. PP* as to the inference of intention. The learned judge had conducted a maximum evaluation of the evidence before him. There was no error of law, principle or finding of fact that went against the evidence. (para 60)

(10) The learned judge had systematically taken the matters raised herein into consideration, both at the end of the prosecution case and at the end of the trial. The learned judge had the advantage of seeing and hearing the witnesses being tested and then formed his findings as to their credibility and the weight he could give to their testimony. An appellate court could not interfere unless the learned judge was shown to have erred in law, in principle or in making a finding of fact that flew in the face of the evidence before him. (para 58)

A ***Bahasa Malaysia*** *Translation of Headnotes*

Perayu telah disabit dan dijatuhkan hukuman mati oleh yang arif hakim Mahkamah Tinggi di bawah s. 302 Kanun Keseksaan kerana membunuh isterinya ('mangsa'). Pada waktu material
B perayu dan mangsa tinggal bersama-sama dengan anak-anak mereka. Tiga anak tersulung perayu telah memberi keterangan sebagai saksi pendakwa. Mereka menjumpai mangsa terbaring kaku di atas katil dengan seutas tali raffia dan tali pinggang terjerut di lehernya. Sementara perayu pula terbaring tanpa sedarkan diri di
C atas lantai dengan sebotol arak di sisinya. Pemeriksaan post mortem ke atas mangsa menunjukkan bahawa beliau mati kerana "ligature strangulation with multiple stab wounds". Perayu kini merayu ke mahkamah semasa terhadap sabitan dan hukumannya.

D Isu-isu yang dibangkitkan, antara lain, adalah: (1) sama ada pendakwaan gagal membuktikan *mens rea* bagi kesalahan; (2) sama ada percanggahan mengenai masa kematian tidak diberikan pertimbangan; (3) sama ada ketepatan kenyataan beramaran di bawah s. 115 Kanun Tatacara Jenayah ('KTJ') boleh dipersoalkan
E kerana pegawai penyiasat bercakap dengan perayu dalam loghat Teochew sedangkan penterjemah bercakap dengannya dalam loghat Hokkien; dan (4) sama ada perayu didorong untuk memberikan kenyataan beramaran memandangkan beliau ditawarkan makanan dan minuman sebelum kenyataannya diambil.

F **Diputuskan (menolak rayuan):**
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Untuk membuktikan keraguan munasabah terhadap kes
G pendakwaan adalah tidak memadai untuk hanya menunjukkan sama ada melalui logika atau akal bahawa keraguan adalah suatu kemungkinan, kerana itu berbentuk teori atau hypothesis semata-mata. Penghujahan perlu berpaksikan kepada fakta dan halkeadaan-halkeadaan tertentu
H yang menjadikan 'possible doubt' sekurang-kurangnya 'probable' sepertimana halnya dalam kes semasa. Keputusan Denning H (sepertimana beliau waktu itu) dalam *Miller v. Minister of Pensions* memberikan panduan berharga kepada peguam-peguam mengenai cara terbaik untuk mengemukakan
I hujah mereka.

(2) Percanggahan mengenai masa kematian tidak dibangkitkan semasa perbicaraan dan kerana itu suatu non-issue. Ianya tidak diajukan kepada anak-anak sama ada mangsa masih hidup apabila mereka menjumpainya, atau kepada pembantu perubatan (SP2) yang menerima jasad mangsa di hospital. Namun, apapun masa sebenar mangsa mati, masa tersebut tidak penting bagi pembelaan. Taakulan yang sama terpakai kepada sebab kematian. Fakta bahawa tiada darah pada tali raffia tidaklah begitu penting kerana ianya tidak dicadangkan bahawa tali raffia menyebabkan kecederaan berdarah kepada leher.

(3) Laporan post-mortem menunjukkan bahawa mangsa mati disebabkan oleh jerutan ligatur jika itulah satu-satunya cara yang digunakan. Ianya tidak diajukan kepada ahli patologi bahawa kecederaan-kecederaan pada leher mangsa seperti yang terserlah dari kesan ligature adalah terhad dan tidak boleh menyebabkan penjerutan. Juga, sementara tiada darah dijumpai pada screwdriver, ianya tidak diajukan kepada saksi relevan bahawa ujian-ujian yang beliau jalankan mengesahkan kewujudan kesan darah pada screwdriver jika ia digunakan untuk menikam mangsa. Juga tidak diajukan kepada ahli patologi yang merumuskan sebab kematian adalah "penjerutan ligatur dan kecederaan-kecederaan tikaman" bahawa kecederaan tikaman tidak boleh menyebabkan kematian.

(4) *Mens rea* tidak boleh dibuktikan melalui keterangan terus tetapi hanya boleh diandaikan dari fakta-fakta lain. Laporan post mortem dan keterangan oral ahli patologi tidak meninggalkan sebarang keraguan mengenai punca kematian, iaitu kecederaan yang disebabkan oleh tujuh kecederaan tikaman yang tidak boleh berlaku secara tidak sengaja.

(5) Tiada asas untuk pembelaan 'manslaughter' melalui kecuaian melampau kerana tali raffia terjerut dengan amat ketat sekali dan juga kerana fakta bahawa mangsa telah ditikam sebanyak tujuh kali.

(6) Soal ketepatan kenyataan beramaran di bawah s. 115 KTJ tidak dibangkitkan semasa pemeriksaan balas. Juga, ketepatan rakaman kenyataan telah tidak ditanyakan kepada majistret semasa perbicaraan dalam perbicaraan. Ia jelas suatu rekaan dan tidak bermerit.

(7) Ujian provokasi berat dan mengejut adalah berbentuk objektif dan bukannya subjektif. Hujah perayu jelas menggunakan ujian subjektif dan harus dengan itu gagal.

(8) Tiada apapun dalam rekod yang menunjukkan bahawa perayu tidak berpuas hati dengan dan menolak kebenaran atau ketepatan keterangan saksi-saksi, sama ada semasa pemeriksaan utama mahupun pemeriksaan balas. Soalan-soalan semasa pemeriksaan balas hanya cuba mencungkil maklumat dan tidak mencabar kebenaran atau ketepatan keterangan saksi-saksi. Oleh itu, tiada keperluan untuk menimbang menolak testimoni atau sebahagian dari testimoni saksi-saksi.

(9) Yang arif hakim telah mengarahkan dirinya secara betul bilamana mengingatkan dirinya terhadap kes *Chan Kim Siong v. PP* iaitu mengenai keterangan ikut keadaan serta kes *Sainal Abidin Mading v. PP* berkaitan anggapan niat. Yang arif hakim telah menjalankan penilaian maksima terhadap keterangan di hadapannya. Tidak berlaku sebarang kekhilafan undang-undang atau prinsip, atau pun rumusan fakta yang bertentangan dengan keterangan.

(10) Yang arif hakim telah mengambilkira perkara-perkara yang dibangkitkan dengan penuh sistematik, sama ada di peringkat kes pendakwaan mahupun di akhir perbicaraan. Yang arif hakim mempunyai kelebihan melihat dan mendengar saksi-saksi diuji dan kemudian membuat rumusannya sendiri berkaitan kredibiliti mereka serta pertimbangan yang beliau boleh berikan kepada keterangan-keterangan mereka. Sebuah mahkamah rayuan tidak boleh mengganggui kecuali jika yang arif hakim dibuktikan telah melakukan kekhilafan undang-undang atau prinsip, atau telah membuat dapatan fakta yang amat bercanggah dengan keterangan di hadapannya.

Case(s) referred to:
Chan Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
R v. Bateman [1925] Cr App R 8 ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Walker [1990] 90 Cr App R 226 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 115
Penal Code, s. 302

For the appellant - Joseph Tan; M/s Tan Chee Keong & Co A
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman; AG's Chambers

[Appeal from High Court, Alor Star; Criminal Trial No: 45-9-2002]

Reported by Usha Thiagarajah B

JUDGMENT

Abdul Wahab Patail JCA: C

[1] The appellant, Tan Chin Meng was tried, found guilty, convicted and sentenced to death under a charge pursuant to s. 302 of the Penal Code on 21 September 2005 by High Court III, Alor Star, Kedah Darul Aman as follows: D

> Bahawa kamu pada 9hb November 1999, di antara jam 4.00 pagi hingga 6.00 pagi, di alamat rumah No. 418, Batu 2, Jalan Kuala Ketil, dalam daerah Kuala Muda, Sungai Petani, di dalam Negeri Kedah Darul Aman, dengan sengaja telah melakukan bunuh sehingga menyebabkan kematian ke atas Lim Chui Nai No. Kad Pengenalan 590419-025788 dengan menjerut lehernya dan menikam menggunakan pemutar skrew, oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan. E

[2] Dissatisfied with the conviction and sentence the appellant filed an appeal to this court. His appeal was heard and dismissed on 31 May 2010, and the conviction and sentence by the High Court was sustained. We now give our reasons. F

The Evidence G

[3] The victim in this case, Lim Chui Nai, is the wife of the appellant. The house at No. 418, Batu 2, Jalan Kuala Ketil, in the District of Kuala Muda, Sungai Petani, in the State of Negeri Kedah Darul Aman is where they lived with their five children Tan Li Fern (SP4), Tan Yee Hon (SP5), Tan Yong Sim (SP6), Tan Yee Siang and Tan Keng Hong. H

[4] On 9 November 1999 at about 6am SP5 Tan Yee Hon, then aged about 11 years entered his parent's bedroom to ask for money for school expenses. SP5 saw his mother lying on the bed I

A and his father on the floor with a bottle of alcohol beside him. He said his father was sleeping, but later in cross-examination he first said he was unconscious, but later said he was sleeping because he snored. He saw his father was not wearing a shirt, but wore shorts. SP5 also saw a raffia string tied around his mother's
B neck as well as a belt on his mother's neck. He saw his mother's face was black and lips pale. He then went to his elder sister Tan Li Fern's (SP4) room to tell her about it. SP4 was then about 15 years of age. Both SP4 and SP5 re-entered their parent's bedroom.

C

[5] SP4 cut the yellow and green coloured raffia string from their mother's neck with a knife. She gave it to a younger brother but could not remember who. She saw their father lying next to the wardrobe, and that he was shirtless and wore pants only. In
D cross-examination, it was brought out that he was unconscious. They informed their uncle who took their mother to the Sg. Petani Hospital. At the hospital their mother was received by one Mohd. Asri bin Samsu (SP2), a Medical Assistant in the emergency unit.

E **[6]** SP2 had informed L/Kpl Saad bin Chin (SP1). SP2 also received a raffia string from Tan Yong Sin (SP6). This was confirmed by SP6.

[7] According to SP6, the raffia string was given to him by his elder brother Tan Yee Siang while in their parent's bedroom. This
F was not challenged. He also told the court he went to his parent's bedroom when he was told by SP4 that their mother had died. In cross-examination, he told the court he saw his father was unconscious.

G **[8]** SP2 handed over the raffia string to SP1, who handed it over the same day to Sub-Inspector Danian bin Abdullah (SP9), Assistant Officer in Charge of the Sg. Petani Police Station. In turn SP9 handed over the raffia string to the Investigating Officer ASP Lim San Aik (SP12).

H

[9] In cross examination, SP6 told the Court when he returned home he found his father lying in the kitchen. The appellant was shirtless but wore pants. He was unsure the pants were long or short. The police had not arrived yet. When police arrived and
I took his father to the hospital he was still unconscious.

[10] When SP4 came back to their house, and this was before the police arrived, she found the appellant sitting in the living room. She said he was fully clothed and had long trousers on. He was not fully conscious.

[11] At about 10.45am the same morning, SP12 had visited the mortuary at the Sg. Petani Hospital to see the victim's body and found there were stab wounds on her chest, string marks and two scratch wounds on her neck.

[12] Then SP12 went to the appellant's house with a photographer where SP12 found the appellant sleeping in the living room of the house.

[13] SP12 entered the bedroom where the victim was found and found on the door of the wardrobe writing in Mandarin and on the bed, blood stains. SP12 took exhibits including the wardrobe door (P9X and Y), bed sheet from the bed (P23), a silver coloured boring tool (P37), a black ink bottle (P38), a painting brush (P39), two medicine wrapper (P40A and B), an "DOM" alcoholic drink bottle, and a yellow handled screw-driver (P18). SP12 received a belt (P10) from SP5 in his office on 16 November 1999.

[14] SP12 has arrested the appellant the same morning and brought him to the Sg. Petani Hospital where he was examined by Dr. Khin Oo May and who warded the appellant for one night.

[15] Dr. Bhupinder Singh (SP10), a Consultant Forensic Pathologist, conducted a post-mortem examination of the victim on 9 November 1999 at about 3.15pm. His post-mortem report was admitted as P19. In his opinion, the cause of death was "Ligature strangulation with multiple stab wounds".

[16] On 11 November 1999, the appellant gave his statement under s. 115 of the Criminal Procedure Code to Encik Azhar bin Mokhtar (SP7) the Magistrate at Sg. Petani. The s. 115 statement was admitted as P12 after a trial within a trial.

[17] The Chemist Sim Hock Lye (SP11) did not find any evidence of blood on the screwdriver and the raffia string.

A

Grounds Of Appeal

[18] Although the grounds of appeal comprised 17 grounds, counsel for the appellant proceeded only upon the grounds which he sets out in his submissions as follows:

B

1. bahawa Pendakwa Raya gagal untuk membuktikan intipati-intipati dalam pertuduhan s. 302 Kanun Keseksaan khasnya dalam isu tentang masa kematian dan "causation" (kesebaban) kematian si-mati;

C

(That the prosecution failed to prove the ingredients of section 302, in particular time of death and cause of death)

2. bahawa Pendakwa Raya gagal untuk membuktikan isu *"mens rea"* yang cukup untuk mensabitkan Tertuduh dibawah s. 302 berkenaan;

D

(That the prosecution failed to prove "mens rea" sufficiently to convict the accused)

3. bahawa Mahkamah Tinggi telah terkhilaf apabila menerima keseluruhan "pernyataan amaran" Tertuduh yang di rekodkan di bawah s. 115 Kanun Aturan Jenayah 1950 oleh Majistret Azhar bin Mokhtar;

E

(That the High Court erred in accepting the whole of the accused's cautioned statement recorded under s. 115 of the Criminal Procedure Code 1950 by the Magistrate Azhar bin Mokhtar)

F

4. bahawa Mahkamah Tinggi telah terkhilaf apabila gagal untuk menelitinya terdapatnya belaan-belaan dalam "pernyataan amaran" tersebut. Sekiranya diterima terutama tentang isu provokasi (kebangkitan marah) yang besar lagi mengejut ("grave and sudden provocation");

G

(That the High Court erred when it failed to examine the cautioned statement as to evidence of defence of grave and sudden provocation)

5. bahawa Mahkamah Tinggi telah terkhilaf apabila gagal untuk memberikan berpihak kepada Tertuduh terdapatnya suatu belaan mabuk ("intoxication")

H

(That the High Court erred in failing to give benefit to the accused of the defence of intoxication)

I

6. bahawa Mahkamah Tinggi telah terkhilaf apabila mengambil keterangan yang tidak relevant dalam penghakimannya.

(That the High Court erred when it took into consideration irrelevant evidence)

[19] We take it, in respect of the first two grounds, that counsel meant that the High Court erred in not appreciating that the prosecution had failed to prove *mens rea*, and the time and cause of death.

[20] Listening to the submissions seeking to show there is a reasonable doubt, we feel the need to remind ourselves of the decision of Denning J (as he then was) in *Miller v. Minister of Pensions* [1947] 2 All ER 372. Indeed it provides a most useful guidance to counsel how best to present their submissions. Denning J said:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "Of course it is possible but not in the least probable", the case is proved beyond reasonable doubt; nothing short will suffice.

[21] Hence, it is not enough to show by logic and reason only there is a possible doubt, for that is only theoretical or hypothetical, but the argument must condescend and point to the particular facts and circumstances that make that possible doubt at least probable in the instant case. For example, it is not enough to show it is possible to cheat, but it must be shown by bringing out evidence or testimony that the person so accused of it has the ability to do it.

The 1st Ground

[22] Counsel submitted upon the question of time of death that while the time of death in the charge is stated to be between 4am and 6am, the post-mortem report stated the time of death as 7am.

[23] The time stated by the pathologist in a post-mortem is necessarily an estimate unless he was present at the time of death. The accuracy of an estimate depends upon many factors, amongst which, it must be admitted, the competency of the pathologist.

[24] But we also note this question was not raised at the trial and, therefore, was not made an issue at trial. It was not put to SP6, SP5 nor SP4 that the victim was still alive when they found the victim, or to SP2 when he received the body.

[25] We are in agreement that the discrepancy as to time of death is immaterial because regardless of actual time of death, this is not a case where time is material to the defence, for example that she died by injuries inflicted by other parties.

[26] Likewise the cause of death.

[27] The fact there is no blood on the raffia string is hardly material since it is not suggested that the raffia string caused a bleeding cut in the neck. The consultant forensic pathologist Dr. Bhupinder Singh (SP10) had stated in his post-mortem report that "She would have died of the ligature strangulation if that was the only mode used." It was not put to SP10 that injuries on the neck indicated by the ligature marks were limited and could not have caused strangulation.

[28] While there was no blood found on the screwdriver, it was not put to the relevant witness Sim Hock Lye (SP11) that the tests he conducted would confirm traces of blood on the screwdriver if it had been used to stab the victim. It was also not put to SP10 who made the conclusion that the cause of her death was "ligature strangulation with multiple stab wounds." that the stab wounds could not have caused death.

[29] We dismiss the first ground of appeal since the questions had not been put to any of the witnesses who found and brought the victim to the hospital or the Hospital Assistant.

The 2nd Ground

[30] *Mens rea* is the intention or mental element that must accompany the *actus reus* in the commission of a crime. It is trite that like "thoughts" it is not capable of proof by direct evidence, but is inferred from other facts. It has often been expressed as that "a person is deemed to intend the natural and probable consequences of his acts". The explanation that you threw out a person from the 21st floor merely to frighten him would not stand an instant's scrutiny. See *Walker* [1990] 90 Cr App R 226.

[31] The post-mortem report and the oral testimony of SP10 left no doubt as to the cause of death, being such injuries caused by strangulation and seven stab wounds that could not have been caused accidentally. In particular, he testified "The stab wounds were inflicted prior to the ligature strangulation. The deceased would have died almost immediately after the ligature strangulation." This testimony was not challenged.

[32] The actual argument raised is the defence of manslaughter by gross negligence. The origin of this defence is found in *R v. Bateman* [1925] Cr. App R 8 where the Court of Criminal Appeal held that gross negligence manslaughter involved the elements of a duty owed to take care; breach of that duty; breach caused the death of the deceased; and negligence was gross, showing such a disregard for the life and safety of others as to amount to a crime and deserve punishment.

[33] We find it is of academic interest only for nothing in the facts and in the cross-examination laid out any basis for it. Tying raffia string so tightly as would cause the ligature injuries found by SP10, and inflicted after stabbing seven times in the thoracic region is difficult to imagine as an act of gross negligence, for negligence if it exists, must be in the course of some explainable activity.

[34] We dismiss this ground of appeal.

[35] We will address the issues of intoxication and grave and sudden provocation separately in grounds 4 and 5 as raised.

The 3rd Ground

[36] The third ground is that the court erred in accepting the appellant's cautioned statement recorded under s. 115 of the Criminal Procedure Code 1950 by the Magistrate Azhar bin Mokhtar (SP7).

[37] Section 115 was repealed by the Criminal Procedure Code Amendment Act 2006 (Act A1274).

[38] The objection raised is two-fold.

[39] Firstly, it was submitted that there are questions about the accuracy of the statement under s. 115 since the Investigating Officer ASP Lim San Saik (SP12) spoke with the appellant in Teochew while the Interpreter Chin Chai Fong (TWT-P2) spoke in Hokkien.

[40] We accept this is possible. We examined the testimonies of SP12, TWT-P1 and of SP7 (TWT-P1). This specific issue was not raised in cross-examination. SP7 clearly stated he asked the appellant who told him he wished to speak in Hokkien. In the event, not only is there tested and fair evidence to consider, but it is clearly an afterthought and contains no merit.

[41] Secondly, it was submitted that there was inducement because after interrogation by the police the appellant was brought to SP7, who before commencing to take the appellant's statement, offered him food and drink.

[42] In examination-in-chief, SP7 told the court:

> Apabila OKT di bawa masuk saya dapati dalam keadaan biasa maksud saya tidak menunjukkan ketakutan atau menggigil. Saya tidak melihat sebarang tanda atau kecederaan pada tubuh badan OKT. Saya telah tanya samada OKT telah makan pagi dan dia jawab sudah dan saya juga tanya samada OKT ada makan tengahari dan dia jawab sudah. Saya tanya OKT samada dia masih lapar dan dia jawab masih lapar. Oleh itu pada jam 12.25 tengahari saya telah arahkan D/Kpl. Ling untuk dapatkan minuman dan makanan OKT. OKT dikeluarkan daripada Kamar saya untuk makan. OKT di bawa balik ke Kamar pada jam 12.48 tengahari pada 11.11.1999. OKT di bawa masuk oleh ASP Lim dan D/Kpl. Ling. OKT tinggal dalam bilik saya dan saya arahkan ASP Lim dan D/Kpl. Ling keluar. Jurubahasa yang sama hadir. Saya tanya OKT samada dia telah makan dan kenyang dan dia jawab sudah makan dan boleh gagah.

[43] As with the ground as to doubting the accuracy of the recording of the statement, this issue was not put to SP7(TWT-P1) in the trial within a trial. The recording of the statement took three and a half hours. Beginning 12.12pm, it ended at 3.30pm. In between at 12.25pm until 12.48pm the appellant was allowed lunch. The present ground is clearly an afterthought and therefore has no merit. Indeed, there might be a more substantial objection if the appellant who said he was still hungry, was denied lunch until he gave his statement.

[44] We, therefore, dismissed this third ground.

The 4th Ground

[45] The fourth ground is that of grave and sudden provocation. It was submitted:

> Dalam keterangannya di dapati sebelum pada hari berkenaan bapa saudaranya telah mati kerana kanser di Taman Ria pada 8/11/1999 serta sebelum itu pada 6/11/1999 emak saudaranya pula telah mati di Pinang Tunggal. Selepas kembalikan ke rumah dengan suatu insiden kemalangan kecil, serta berleter kepada suaminya yang dia malas dan selalu mahu wang.

> Untuk masa-masanya biasa ia mungkin tidak merupakan suatu provokasi "mengejut dan melampau" tetapi pada masa kematian saudara, pernyataan tersebut bukan sahaja memberi implikasi bahawa si-mati bukan sahaja tidak berhormat kepada suaminya tetapi juga keluarganya yang mengalami perkara sedih tersebut. Ia adalah satu ujian objektif.

[46] The test of grave and sudden provocation is objective and not subjective. The submission clearly applied the test subjectively.

[47] We dismissed the fourth ground as being not supported by the very submission made therefor.

The Fifth Ground

[48] The fifth ground is that of intoxication. It was abandoned at submission's stage.

[49] The point brought to the attention of the court is that the appellant's urine was reported to contain 55 mg ethyl alcohol per 100 ml. In the absence of expert testimony, it is not only unsafe but impossible to draw valid conclusions.

The Sixth Ground

[50] It was submitted that the High Court took into consideration irrelevant evidence.

[51] The first is the writing on the door of the wardrobe, of which the chemist Wong Kong Yong of Jabatan Kimia Malaysia had this to say:

> Pemeriksaan berdasarkan kepada perbandingan dokumen-dokumen yang ada tidak membenarkan saya memberi pendapat samada tulisan pada pintu almari dalam bungkusan-bungkusan tersebut telah di hasilkan oleh penulis contoh tulisan tangan ataupun tidak.

[52] The second is the statement of Dr. Khin Oo May (at exh. P43) who was not called.

[53] The order of the court at p. 133 of the record of appeal clearly sets out as follows:

> Bahagian "on examination" dan "plan" dalam laporan perubatan itu diterima sebagai keterangan pihak Pendakwaan dan bahagian "history" dikeluarkan kerana mengandungi keterangan yang tidak boleh diterima (inadmissible). Ditanda P43.

A **[54]** The third is the "Senarai Bongkar" which was signed on 9 November 1999, raising the question whether it was signed by the appellant or another since he was hospitalised for a day on that day.

B **[55]** We hold that these issues are immaterial. The criminal court is presided by a judge, and he is not assisted by a jury. The concern behind the objection exists in a jury system because members of the jury are laymen. It does not arise when the judge sits alone.

C **[56]** Further, the Chemist's report by Wong Kong Yong leaves no doubt the caution that he cannot testify as to any link between the writing to the appellant. Likewise, with regard to P43, there is the judge's own order recognising there was inadmissible content. To our mind, it is preferable to put P43 into the record D with the order as to its inadmissible parts rather than not letting P43 into the record because it eliminates speculation and allows the appellate court to see directly whether the learned judge had improperly taken it into consideration and if so to what extent. Indeed, counsel for the appellant had submitted to review the E admission of exh. P12 in the light of the report by Dr. Khin Oo May that the appellant was "Rational but very drowsy." A defence loses credibility and therefore its value when one approbates and reprobates.

F **[57]** As to the third objection, there is no rule the "Senarai Bongkar" must be signed by the appellant. Suffice it is signed by someone witnessing the finding and taking into custody of the items listed.

G **Conclusion**

[58] The matters raised before us were raised before the learned judge who had taken the matters into consideration systematically, both at the end of the prosecution case and at the end of the H trial. The learned judge had the advantage of seeing and hearing the witnesses being tested and then formed his findings as to their credibility and the weight he could give to their testimony. An appellate court cannot interfere unless the learned judge is shown to have erred in law, principle or in making a finding of fact that I flew in the face of the evidence before him.

[59] We observe from the record of appeal that there is nothing in the record that shows that counsel for the appellant was dissatisfied with and rejected the truth or accuracy of the testimony of the witnesses, whether in examination-in-chief or in cross-examination. Counsel's cross-examination questions were in the nature of questions to obtain information that did not follow through to a challenge of the truth or accuracy of the testimony of the witness. There was, therefore, no necessity to consider rejecting the testimony or any part thereof, of any witness.

[60] We find the learned judge had directed himself correctly when he reminded himself of *Chan Kim Siong v. Public Prosecutor* [1968] 1 MLJ 36 with regard to circumstantial evidence and *Sainal Abidin bin Mading v. Public Prosecutor* [1999] 4 CLJ 215 as to the inference of intention. We find the learned judge had conducted a maximum evaluation of the evidence before him before coming to his conclusion. We find no error of law, principle or finding of fact that flies in the face of the evidence.

[61] Accordingly, we affirmed the decision of the High Court and dismissed this appeal.